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Supreme Court, U.S.
FILED
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CLERK

No. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

CHARLIE BROYLES, et al.

Respondents.

RESPONDENTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit and attached declaration, move for leave to proceed in forma pauperis before this Court. Respondents did not seek leave to proceed in forma pauperis before the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Robert E. Lehrer

Robert E. Lehrer
One of the Attorneys for
Respondents

Raymond T. Reott
Jenner & Block
One IBM Plaza
42nd Floor
Chicago, IL 60611
Phone: 312/222-9350

Julian N. Henriques, Jr.
Robert E. Lehrer*
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, IL 60604
Phone: 312/341-1070

Attorneys for Respondents

*Counsel of Record

NO. 87-1095

IN THE
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Petitioner,

- vs. -

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, CHARLIE BROYLES, being first duly sworn, depose and say that I am one of named respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   June 1976 - $1300 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **YES**

   a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

   $701 per month in social security benefits; $195 per month in private pension benefits.

3. Do you own any cash or checking or savings account? **YES**

   a. If the answer is yes, state the total value of the item owned.

   I have about $4,500 in a checking account. My checking account funds are mainly used to meet medical expenses Medicare does not cover, and are intended as a reserve against future medical expenses my wife or I may incur, that Medicare would not cover.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **YES**

   a. If the answer is yes, describe the property and state its approximate value.

   My wife and I jointly own the home we live in in Chicago. The approximate value of the home is $60,000.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   My wife is wholly dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charlie Broyles
CHARLIE BROYLES

Subscribed and Sworn
before me this 4th
day of February
1988.

Benitye Clay
Notary Public

"OFFICIAL SEAL"
BENITYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 6/19/91

"OFFICIAL SEAL"
BENITYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS

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Respondents.

DECLARATION IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, LISA KAY COLLEY, declare that I am one of named respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   January 4, 1988 was the date of my last employment. My gross wages were $580.00 monthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **NO**

   a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? **NO**

   a. If the answer is yes, state the total value of the item owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **NO**

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   I have no dependents.

I declare under penalty of perjury that the foregoing is true and correct.

X Lisa Kay Colley
LISA KAY COLLEY

Executed on: February 14, 1988.

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CHARLIE BROYLES, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Raymond T. Reott
Jenner & Block
One IBM Plaza
42nd Floor
Chicago, IL 60611
Phone: 312/222-9350

Julian N. Henriques, Jr.
Robert E. Lehrer*
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, IL 60604
Phone: 312/341-1070

Attorneys for Respondents

*Counsel of Record

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Because it omits material facts, petitioner's Statement does not offer an accurate account of the miners' employment histories or of the medical evidence.

A. Respondent Charlie Broyles

Charlie Broyles worked underground in the coal mines of Virginia for five years, as a "coal loader" and as a "track man." (Broyles Claim Form EM-911,p.4; Broyles' Deposition; pp.5-6)[1] Both jobs involved very heavy exposure to coal dust. (Id. pp.49-51,52-53).

From 1952-1976, Mr. Broyles worked in a succession of non-mining jobs. (Id. pp. 56-62; 72, 81.). One of these jobs, which he held for five years, involved occasional exposure to asbestos; but a vacuum machine that Mr Broyles regularly used substantially

[1] Statement citations are all to items in respondents' administrative records that were included in the joint appendices filed with the Court of Appeals for the Fourth Circuit.

limited any adverse effects of such exposure. (January 3, 1982 letter from Steven Hessl M.D., M.P.H.; Broyles Affidavit, March, 1981; Broyles Dep. pp. 13-26). Another job, which he held for a year, required Mr. Broyles to pour powder from a small can into a hole in a machine (Broyles Affidavit, March, 1981), but there was no resulting exposure to dust in the air Mr.Broyles breathed. (Id.; Broyles Dep. p.18.). No other jobs Mr. Broyles held from 1952-1976 involved any possible environmental dust exposure. (Id. pp. 13-38). Mr. Broyles has not worked since 1976.

Mr. Broyles has great difficulty in breathing, and is frequently short of breath (Report of Physical Examination by Steven Hessl, M.D., M.P.H.). He developed these symptoms while still working in the mines, and he has regularly received medical treatment for them since the early 1960s. (Broyles Affidavit, March 1981; Broyles Dep. p. 12). At the time of his administrative hearing, he was giving himself oxygen three hours a day, as directed by his physician. (Id. pp. 23-24).

The administrative record includes readings of three x-rays taken of Mr. Broyles' lungs. (Roentgenographic Reports of x-rays taken July 1, 1980, March 11, 1980, February 9, 1977). Readings of all three x-rays were positive for pneumoconiosis. (Id.)

The administrative record also contains reports from three doctors, but only one of these physicians ever examined Mr. Broyles. The examining physician was Steven Hessl, M.D., M.P.H., a specialist in occupational health medicine. He prepared two separate reports, based on his several examinations of Mr. Broyles. (Reports of May, 1977 and March, 1980). In both reports, he concluded that Mr.Broyles was suffering from atherosclerotic cardiovascular disease and pneumoconiosis arising out of his coal mine employment (Id.). In a supplement to the second report, he noted further that he had taken into account

Mr. Broyles' possible exposure to asbestos, but viewed any exposure as of "considerably less importance" in causing his pneumoconiosis than his work in the coal mines.(January 3, 1982 letter from Dr. Hessl). Dr. Hessl also concluded (in the first report) that Mr. Broyles' respiratory impairment was "moderate to severe" and that he was "able to walk only a few dozen feet on level ground without symptoms" and "is unable to climb,lift." The second report confirmed this finding.

B. Bill Colley, Father of Respondent Lisa Kay Colley

Bill Colley worked underground in the coal mines of Kentucky and West Virginia for at least nine and one-half years, though there is record evidence (not credited by the Administrative Law Judge) that he in fact worked for several years longer than that. (Colley ALJ Dec.) However long he actually worked in the mines, the jobs he performed involved heavy exposure to coal dust. (ALJ Hearing Testimony, p. 17).

The administrative record includes two x-rays read for pneumoconiosis. (Reports of x-rays taken April 1, 1975 and November 8, 1977). The more recent x-ray was read as positive for pneumoconiosis by John J. Fitzpatrick, M.D., a board certified radiologist. (Id.)

The record includes reports from three physicians who examined Mr. Colley: Steven Hessl, M.D., M.P.H.; Edward Sutoris, M.D. and William Kellum, M.D.

Dr. Hessl concluded that Mr. Colley suffered from hypertension, chronic bronchitis, and coal workers' pneumoconiosis. (Report of November 1, 1978). He found further that Mr. Colley's bronchitis and pneumoconiosis were related to his exposure to dust in the coal mines where he worked, and that his exercise capacity was "about one block on level ground." (Id.)

Dr. Sutoris concluded that Mr. Colley suffered from "chronic

obstructive pulmonary disease", a respiratory impairment, that was "moderately severe." (Report of May 13, 1976). He did not offer an opinion as to the cause of this respiratory impairment. (Id.)

Dr. Kellum concluded that Mr. Colley suffered from possible chronic bronchitis, but probably no restrictive disease. (Kellum Report of April 1, 1975). He found that Mr. Colley was unable to climb stairs or ladders, or walk up-grade and that he was breathless upon walking on a level grade. (Id.) While concluding that Mr. Colley's respiratory condition was not related to his coal mine employment, he did not offer any alternative explanation for what might have caused his condition. (Id.)

ARGUMENT

This Court recently granted the petitions for certiorari in No. 87-821, Pittston Coal Group v. Sebben, and in No. 87-827, McLaughlin, Sec. of Labor v. Sebben, 56 U.S.L.W. 3568 (U.S. February 22, 1988). It also consolidated the two cases. Id.

The consolidated case ("Sebben") presents for review five questions between the two petitions. Four of these questions involve principally the nature and scope of remedies available to black lung claimants for asserted violations of their statutory rights, and have no analogues in this case. See Petition in No. 87-821 (Questions Presented Nos. 1, 3,and 4), Petition in No. 87-827 (Question Presented). The question the Director, Office of Workers' Compensation (the "Director") presents for review here, and the remaining question in Sebben (Question No. 2 in No. 87-821), ask whether the Director acted consistently with Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), in refusing to apply the interim presumption in 20 C.F.R. §410.490 to certain black lung benefit claimants with less than 10 years demonstrated employment in the mines (the "substantive

Section 402(f)(2) question").[2] The court of appeals here, of course, ruled that the Director's refusal to apply the presumption did violate Section 402(f)(2).

When, as here, the question presented for review has already been accepted for review in another case, we acknowledge that there is virtually no possibility this Court will nonetheless deny the pending petition for a writ. In this situation, this Court ordinarily holds the petition and disposes of the case as appropriate in light of the disposition of the case in which review has been granted. See, e.g., Keney v. New York, 388 U.S. 440 (1967).

The ordinary course may not, however, be the most appropriate course here. As explained in note 2 supra, the court of appeals in Sebben, in contrast to the court of appeals here, never even addressed the substantive Section 402(f)(2) question. Indeed, neither the black lung benefit claimants in Sebben, nor the federal officials they sued, ever joined issue with respect to the substantive Section 402(f)(2) question in that case. Instead, they merely litigated the appropriate scope of relief to be afforded these individuals, given that the Eighth Circuit, in Coughlin v. Director, Office of Workers' Compensation, 757 F.2d 966 (8th Cir. 1985), had previously decided the substantive Section 402(f)(2) question favorably to black lung benefit

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[2] The two variant formulations of this question in No. 87-821 and here are explained, in part, by the fact that the court of appeals in Sebben never addressed it. See, Sebben v. Brock, 815 F.2d 475 (8th Cir. 1987). In this case, in contrast, the court of appeals did address this question, the parties having joined issue on it not only before that court, but before the Benefits Review Board as well. Broyles v. Director, Office of Workers' Compensation, 824 F. 2d 327 (4th Cir. 1987). In this context, the Secretary of Labor (the "Secretary"), by the Director, understandably framed the substantive Section 402(f)(2) question here in terms of the court of appeals' decision in this case. See Petition at (I). In contrast, the several coal companies and insurance company who alone presented this question in Sebben (in their petition in No. 87-821) framed it in the abstract, without reference to any specific court of appeals' ruling.

substantive Section 402(f)(2) question for review in her petition in Sebben. Rather, the substantive Section 402(f)(2) question was first presented in Sebben only by the coal company/insurance company petitioners in No. 87-821 ("Pittston"), who had introduced it into the Sebben litigation in their petition to rehear the panel decision--a petition the court of appeals subsequently denied without the coal miner claimants' in Sebben being required to respond.[3] While formally presenting this question for review in Sebben, moreover, even these petitioners hardly pressed it as a basis for issuance of the writ: the petition in No.87-821 is devoid of any argument respecting that substantive issue, as distinguished from the remedial questions. In sum, the substantive Section 402(f)(2) question comes before this Court in Sebben, never having previously been an issue in that case, and without any factual record illustrating the application of Section 402(f)(2) to the claims of particular miners.

Even though there is no jurisdictional bar to its doing so, this Court does not ordinarily consider questions not specifically considered and passed upon by the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976);, Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition, but not to court of appeals, will not be considered). It is therefore possible that, upon further consideration, this Court will conclude that Sebben is not an appropriate (or at least not the most appropriate available) vehicle for resolution of the substantive Section 402(f)(2) question, especially given the

[3] Pittston's rehearing petition was accompanied by its motion to intervene. The court of appeals granted that motion. Petitioners in No. 87-821 thus became parties in Sebben only after the court of appeals' ruling now to be reviewed, and are parties to the proceeding in this Court, never having previously participated in that litigation in any significant way.

absence of any factual record respecting that issue in that case. See, Wainwright v.City of New Orleans, 392 U.S. 598, 599 (1967) (concurring opinions of Justices Harlan and Fortas) (dismissal of writ as improvidently granted where factual record is "too opaque" and "too sketchy" to permit resolution of federal issue).[4]

If this Court does conclude that Sebben is not an appropriate vehicle for resolving the substantive Section 402(f)(2) question, then it will not decide that question in that case. Alternatively, there is a risk that the Court will decide Sebben based on the one or more of the several remedial questions presented, without reaching the substantive Section 402(f)(2) question. In either eventuality, the substantive Section 402(f)(2) question, which this Court has already decided merits its consideration, would remain unresolved --and this Court would then presumably grant certiorari in this case during the October 1988 term, and subsequently hear it. Respondents here, however, would be harmed by the resulting delay in resolving the substantive Section 402(f)(2) question, the only issue in their cases. The court of appeals' decision in their favor remanded their claims to the administrative process for further review, and therefore neither respondent can secure the benefits claimed until this Court acts. Mr. Broyles has, indeed, already waited since 1976 for the disability benefits he seeks, and Mr. Colley died during the 14 years that his claim (which his daughter now presses) has been pending.

By granting certiorari on the substantive Section 402(f((2) question presented in Sebben, this court has already decided,

[4] The Solicitor General, of course, reached precisely that conclusion, in urging that the substantive Section 402 (f) (2) question be resolved in this case, and not in Sebben. See Petition in No.87-827 at pp. 16-18. Indeed, as noted supra, the Secretary did not even present the substantive Section 402(f)(2) question for review in her petition in Sebben.

question presented in Sebben, this court has already decided, that that question merits its consideration. Given that decision, however, the risk that this substantive question will nonetheless not be decided in Sebben (because the Court concludes that it is not an appropriate vehicle for resolving it, or because of the possibility that it may not reach it), and the desirability of resolving it in a case where the court of appeals addressed it and there is an adequate factual record, are both factors why it would be appropriate to grant the writ of certiorari here without further delay. If certiorari is granted in this case this term, then the Court should schedule oral argument here in tandem with the oral argument in Sebben.

CONCLUSION

The Court should either hold the petition pending disposition of the substantive Section 402(f)(2) question in Sebben, or, if the Court concludes that this question may not be decided in Sebben, or wishes to resolve it in a case where the court of appeals addressed it and there is an adequate factual record, the Court should grant the petition and schedule oral argument in the case in tandem with the argument in Sebben.

Respectfully submitted,

Raymond T. Reott
Jenner & Block
One IBM Plaza
42nd Floor
Chicago, IL 60611
Phone: 312/222-9350

Julian N. Henriques, Jr.
Robert E. Lehrer *
Legal Assistance Foundation
of Chicago
343 S. Dearborn Street
Chicago, IL 60604
Phone: 312/341-1070

Attorneys for Respondents

March 1988

*Counsel of Record